

2009 DRAFTING REQUEST

Bill

Received: **08/28/2009**

Received By: **rnelson2**

Wanted: **As time permits**

Identical to LRB:

For: **Lena Taylor (608) 266-5810**

By/Representing: **Eric**

This file may be shown to any legislator: **NO**

Drafter: **rnelson2**

May Contact:

Addl. Drafters:

Subject: **Courts - immunity liability**

Extra Copies:

Submit via email: **YES**

Requester's email: **Sen.Taylor@legis.wisconsin.gov**

Carbon copy (CC:) to: **Annie@martinschreiber.com**

Pre Topic:

No specific pre topic given

Topic:

Indemnity in construction contracts

Instructions:

See attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
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/1			phenry 09/01/2009	_____	lparisi 09/01/2009	sbasford 09/15/2009	
/2	rnelson2 09/30/2009	kfollett 10/01/2009	jfrantze 10/01/2009	_____	sbasford 10/01/2009	sbasford 10/01/2009	
	rnelson2 11/06/2009	kfollett 11/12/2009		_____			

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11/13/2009 _____

mbarman _____
11/13/2009 _____

mbarman _____
11/13/2009 _____

FE Sent For:

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none

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Annie Early
annie@martinschreiber.com

Requester's email: Sen.Taylor@legis.wisconsin.gov

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Instructions:

11/6 Discussion w/ Annie Early and
Jeff B. of Martin Schreiber

See attached

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/?	rnelson2	8/31 jld OKed by REN	9 ph	9 ph			
FE Sent For:				<END>			

Kunkel, Mark

To: Nelson, Robert P.; Hurley, Peggy
Subject: Sen. Taylor request: indemnification in construction contracts

A while back, Eric in Sen. Taylor's office called to make a request to create something similar to a Colorado law that limits indemnification in construction contracts. He sent me the Colorado bill, which I put on Peggy's chair, along with an article from an ABA construction law newsletter that describes the Colorado law.

I told Eric I'd figure out who will draft this. I've determined that we already have a statute, s. 895.447, that appears to address the same topic. So, I think that falls in your courts and procedure area.

Can one of you look at this and either enter it or get back to Eric on whether Wisconsin law already adequately addresses the issue?

This came in a while ago (2 weeks?). My apologies for the delay. However, Taylor's office hasn't called about it, and they did not say that it is a priority.

Thanks,

-- Mark



December 2007

The newsletter of the ABA Forum on the Construction Industry

UNDER CONSTRUCTION

Colorado's New Anti-Indemnity Statute: Mere Splash or Next Wave?

By Terry J. Galganski
The Weitz Company LLC

Another state has acted decisively to eliminate certain contractual risk transfers that have been available to most parties involved in the state's construction industry - namely, indemnity and additional insured status. This time, it's Colorado. Its legislation makes no mistake about Colorado's path forward. It is unambiguous. It is all about public safety. It happened in April 2007 when Colorado's governor, Bill Ritter, signed into law Senate Bill 07-087, which became Colorado Rev. Stat. § 12-21-111.5 (6) (Statute).^[1] This Statute affects nearly all construction agreements involving real property in Colorado that are executed on or after July 1, 2007.

Before addressing this Statute in greater detail, it is relevant to discuss the backdrop and recent trends of existing anti-indemnity statutes throughout the United States. As of this writing, forty-four states have enacted some kind of anti-indemnity statute^[2]. But, in the last five years, there have been some significant signs of constriction in the breath of any construction-related indemnity or insurance to effectuate broad contractual risk transfer. Such examples include California's 2006 addition of Civil Code § 2782.8^[3], Kansas and Kentucky's elimination of any indemnity for sole or partial fault of the indemnitee in 2004 and 2005 respectively^[4], and, most relevant for this discussion, Montana, New Mexico and Oregon's recognition that neither an indemnity nor additional insured coverage will be allowed to protect another from its own actions via legislation in 2003 for the

first two states and statutory confirmation via case law by an opinion issued by the Oregon Supreme Court in 2005.^[5]

Continued on Page 4

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Appointment of the Nominating Committee

The following people have been appointed to **serve** on the Nominating Committee, and to select and submit to the membership the nominees for the positions of Chair-Elect and four Governing Committee Members at Large:

CHAIR

Robert J. MacPherson Thelen
Reid Brown Raysman & Steiner LLP
900 Third Avenue
New York, New York 10022

MEMBERS

Deborah S. Ballati D. Robert Beaumont
C. Allen Gibson Anne Gorham
Larry D. Harris Danny G. Shaw

Nominations for Chair-Elect and Governing Committee Members-at-Large should be sent to the Chair of the Committee, Robbie MacPherson, by January 12, 2008. The election will be held during the business meeting of the Forum's Annual Meeting in April 2008. Nominations may be made by third persons and by self-nomination. All nominations or expressions of interest in being considered as a nominee should

Continued on Page 6

Colorado's Anti-Indemnity Statute

Continued from Page 1

As reflected in these last three examples, Colorado has adopted similar restrictions with its Statute. Except for certain exceptions mentioned below, the Statute eliminates the enforceability of all broad and intermediate indemnity provisions and severely narrows additional insured coverage in Colorado construction contracts. Its enactment knocks over the existing, anti-indemnity statutory "apple cart" in Colorado, which had essentially rendered unenforceable only those provisions in public construction contracts that indemnified public entities for their negligence.

As relevant as these prohibitions are the several findings made by the Colorado's General Assembly that are set forth in the Statute's first section, which clearly reflect the comparative negligence cornerstone of Colorado's tort reform legislation that occurred in 1986:[6]

(I) It is in the best interests of this state and its citizens and consumers to ensure that every construction business in the state is financially responsible under the tort liability system for losses that a business has caused;

...

(III) Construction businesses in recent years have begun to use contract provisions to shift the financial responsibility for their negligence to others, thereby circumventing the intent of tort law;

(IV) It is the intent of the General Assembly that the duty of a business to be responsible for its own negligence be nondelegable;

...

(VII) If all businesses, large and small, are responsible for their own actions, then construction companies will be able to obtain adequate insurance,

the quality of construction will be improved, and workplace safety will be enhanced. (Emphasis supplied.)[7]

Following these findings, the Statute sets forth the following constraints on every Colorado "construction agreement", which is so broadly defined to essentially include all future construction between any construction industry participant in Colorado[8] except for its specific exclusions for contracts that involve property owned by railroads and various water, sanitation or sewage districts or leases, including construction concerning such rental properties:[9]

Any provision that requires a person to "indemnify, insure or defend" another for damages or injuries caused by the negligence or fault of that party "is void as against public policy and unenforceable." [10]

Any provision to indemnify or insure another will not be for "any amounts greater than that represented by the degree or percentage of negligence or fault attributable to the indemnitor or the indemnitor's agents, representatives, subcontractors or suppliers." [11]

Any provision "that requires the purchase of additional insured coverage for damage[s] ... from any acts or omissions that are not caused by the negligence or fault of the party providing such additional insured coverage is void as against public policy." [12]

Furthermore, the Statute also preempts any choice of law provision that any party may wish to draft in these construction agreements, maintaining that this Statute will control in "every construction agreement affecting improvements to real property within the state of Colorado." [13] All in all, Colorado represents, in the author's opinion, a growing trend to eliminate risk transfer by indemnity and additional insured coverage. This trend may become more than a splash. Colorado may start the wave.

[1] A good overview article on this new legislation is Brian G. Eberle's "S.B. 07-087 and the Enforceability of Indemnification Provisions in Colorado Construction Contracts", 36 The Colorado Lawyer 59 (Sept 2007) (Eberle's Article).

[2] These states include AK, AZ, CA, CO, CT, DE, FL, GA, HI, ID, IL, IN, KS, KY, LA, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VA, WA, WV and WI.

[3] In the fall 2006, AB 573 was signed into law, eliminating any passive negligence protection to local public agencies (it specifically excludes the State of California) in professional services agreements entered into on or after January 1, 2007.

[4] See Kansas Stat. § 16-121 and Kentucky Rev. Stat., chap. 371.

[5] See Montana Rev. Code § 28-2-2111, N.M. Rev. Stat. § 56-7-1 and Ore. Rev. Stat. § 30.140 and Walsh Construction Co. v. Mutual of Enumclaw, 104 P.2d 1146 (Ore. 2005).

[6] Eberle's Article, p.59.

[7] Col. Rev. St. § 13-21-111.5 (6)(a).

[8] Col. Rev. St. § 13-21-111.5 (6)(e)(I).

[9] Col. Rev. St. § 13-21-111.5 (6)(e)(II).

[10] Col. Rev. St. § 13-21-111.5 (6)(b).

[11] Col. Rev. St. § 13-21-111.5 (6)(c).

[12] Col. Rev. St. § 13-21-111.5 (6)(d).

[13] Col. Rev. St. § 13-21-111.5 (6)(g).

S. 895.447

An Act

SENATE BILL 07-087

BY SENATOR(S) Tapia, Bacon, Kester, Williams, Keller, Shaffer, and Windels;

also REPRESENTATIVE(S) Fischer, Cerbo, McKinley, Merrifield, Riesberg, Soper, Butcher, Benefield, Curry, Frangas, Gagliardi, Hodge, Liston, McFadyen, Borodkin, Green, Kerr A., Labuda, Levy, and Pommer.

CONCERNING A PROHIBITION AGAINST THE SHIFTING OF FINANCIAL RESPONSIBILITY FOR NEGLIGENCE IN CONSTRUCTION AGREEMENTS.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. 13-21-111.5, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SUBSECTION to read:

13-21-111.5. Civil liability cases - pro rata liability of defendants - shifting financial responsibility for negligence in construction agreements. (6) (a) THE GENERAL ASSEMBLY HEREBY FINDS, DETERMINES, AND DECLARES THAT:

(1) IT IS IN THE BEST INTERESTS OF THIS STATE AND ITS CITIZENS AND CONSUMERS TO ENSURE THAT EVERY CONSTRUCTION BUSINESS IN THE STATE IS FINANCIALLY RESPONSIBLE UNDER THE TORT LIABILITY SYSTEM FOR LOSSES THAT A BUSINESS HAS CAUSED;

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

(II) THE PROVISIONS OF THIS SUBSECTION (6) WILL PROMOTE COMPETITION AND SAFETY IN THE CONSTRUCTION INDUSTRY, THEREBY BENEFITTING COLORADO CONSUMERS;

(III) CONSTRUCTION BUSINESSES IN RECENT YEARS HAVE BEGUN TO USE CONTRACT PROVISIONS TO SHIFT THE FINANCIAL RESPONSIBILITY FOR THEIR NEGLIGENCE TO OTHERS, THEREBY CIRCUMVENTING THE INTENT OF TORT LAW;

(IV) IT IS THE INTENT OF THE GENERAL ASSEMBLY THAT THE DUTY OF A BUSINESS TO BE RESPONSIBLE FOR ITS OWN NEGLIGENCE BE NONDELEGABLE;

(V) CONSTRUCTION BUSINESSES MUST BE ABLE TO OBTAIN LIABILITY INSURANCE IN ORDER TO MEET THEIR RESPONSIBILITIES;

(VI) THE INTENT OF THIS SUBSECTION (6) IS TO CREATE AN ECONOMIC CLIMATE THAT WILL PROMOTE SAFETY IN CONSTRUCTION, FOSTER THE AVAILABILITY AND AFFORDABILITY OF INSURANCE, AND ENSURE FAIRNESS AMONG BUSINESSES;

(VII) IF ALL BUSINESSES, LARGE AND SMALL, ARE RESPONSIBLE FOR THEIR OWN ACTIONS, THEN CONSTRUCTION COMPANIES WILL BE ABLE TO OBTAIN ADEQUATE INSURANCE, THE QUALITY OF CONSTRUCTION WILL BE IMPROVED, AND WORKPLACE SAFETY WILL BE ENHANCED.

(b) EXCEPT AS OTHERWISE PROVIDED IN PARAGRAPHS (c) AND (d) OF THIS SUBSECTION (6), ANY PROVISION IN A CONSTRUCTION AGREEMENT THAT REQUIRES A PERSON TO INDEMNIFY, INSURE, OR DEFEND IN LITIGATION ANOTHER PERSON AGAINST LIABILITY FOR DAMAGE ARISING OUT OF DEATH OR BODILY INJURY TO PERSONS OR DAMAGE TO PROPERTY CAUSED BY THE NEGLIGENCE OR FAULT OF THE INDEMNITEE OR ANY THIRD PARTY UNDER THE CONTROL OR SUPERVISION OF THE INDEMNITEE IS VOID AS AGAINST PUBLIC POLICY AND UNENFORCEABLE.

(c) THE PROVISIONS OF THIS SUBSECTION (6) SHALL NOT AFFECT ANY PROVISION IN A CONSTRUCTION AGREEMENT THAT REQUIRES A PERSON TO INDEMNIFY AND INSURE ANOTHER PERSON AGAINST LIABILITY FOR DAMAGE, INCLUDING BUT NOT LIMITED TO THE REIMBURSEMENT OF ATTORNEY FEES AND COSTS, IF PROVIDED FOR BY CONTRACT OR STATUTE, ARISING OUT OF

DEATH OR BODILY INJURY TO PERSONS OR DAMAGE TO PROPERTY, BUT NOT FOR ANY AMOUNTS THAT ARE GREATER THAN THAT REPRESENTED BY THE DEGREE OR PERCENTAGE OF NEGLIGENCE OR FAULT ATTRIBUTABLE TO THE INDEMNITOR OR THE INDEMNITOR'S AGENTS, REPRESENTATIVES, SUBCONTRACTORS, OR SUPPLIERS.

(d) (I) THIS SUBSECTION (6) DOES NOT APPLY TO CONTRACT CLAUSES THAT REQUIRE THE INDEMNITOR TO PURCHASE, MAINTAIN, AND CARRY INSURANCE COVERING THE ACTS OR OMISSIONS OF THE INDEMNITOR, NOR SHALL IT APPLY TO CONTRACT PROVISIONS THAT REQUIRE THE INDEMNITOR TO NAME THE INDEMNITEE AS AN ADDITIONAL INSURED ON THE INDEMNITOR'S POLICY OF INSURANCE, BUT ONLY TO THE EXTENT THAT SUCH ADDITIONAL INSURED COVERAGE PROVIDES COVERAGE TO THE INDEMNITEE FOR LIABILITY DUE TO THE ACTS OR OMISSIONS OF THE INDEMNITOR. ANY PROVISION IN A CONSTRUCTION AGREEMENT THAT REQUIRES THE PURCHASE OF ADDITIONAL INSURED COVERAGE FOR DAMAGE ARISING OUT OF DEATH OR BODILY INJURY TO PERSONS OR DAMAGE TO PROPERTY FROM ANY ACTS OR OMISSIONS THAT ARE NOT CAUSED BY THE NEGLIGENCE OR FAULT OF THE PARTY PROVIDING SUCH ADDITIONAL INSURED COVERAGE IS VOID AS AGAINST PUBLIC POLICY.

(II) THIS SUBSECTION (6) ALSO DOES NOT APPLY TO BUILDER'S RISK INSURANCE.

(e) (I) AS USED IN THIS SUBSECTION (6) AND EXCEPT AS OTHERWISE PROVIDED IN SUBPARAGRAPH (II) OF THIS PARAGRAPH (e), "CONSTRUCTION AGREEMENT" MEANS A CONTRACT, SUBCONTRACT, OR AGREEMENT FOR MATERIALS OR LABOR FOR THE CONSTRUCTION, ALTERATION, RENOVATION, REPAIR, MAINTENANCE, DESIGN, PLANNING, SUPERVISION, INSPECTION, TESTING, OR OBSERVATION OF ANY BUILDING, BUILDING SITE, STRUCTURE, HIGHWAY, STREET, ROADWAY BRIDGE, VIADUCT, WATER OR SEWER SYSTEM, GAS OR OTHER DISTRIBUTION SYSTEM, OR OTHER WORK DEALING WITH CONSTRUCTION, OR FOR ANY MOVING, DEMOLITION, OR EXCAVATION CONNECTED WITH SUCH CONSTRUCTION.

(II) "CONSTRUCTION AGREEMENT" DOES NOT INCLUDE:

(A) A CONTRACT, SUBCONTRACT, OR AGREEMENT THAT CONCERNS OR AFFECTS PROPERTY OWNED OR OPERATED BY A RAILROAD, A SANITATION DISTRICT, AS DEFINED IN SECTION 32-1-103 (18), C.R.S., A WATER DISTRICT,

AS DEFINED IN SECTION 32-1-103 (25), C.R.S., A WATER AND SANITATION DISTRICT, AS DEFINED IN SECTION 32-1-103 (24), C.R.S., A MUNICIPAL WATER ENTERPRISE, A WATER CONSERVANCY DISTRICT, A WATER CONSERVATION DISTRICT, OR A METROPOLITAN SEWAGE DISPOSAL DISTRICT, AS DEFINED IN SECTION 32-4-502 (18), C.R.S.; OR

(B) ANY REAL PROPERTY LEASE OR RENTAL AGREEMENT BETWEEN A LANDLORD AND TENANT REGARDLESS OF WHETHER ANY PROVISION OF THE LEASE OR RENTAL AGREEMENT CONCERNS CONSTRUCTION, ALTERATION, REPAIR, IMPROVEMENT, OR MAINTENANCE OF REAL PROPERTY.

(f) NOTHING IN THIS SUBSECTION (6) SHALL BE CONSTRUED TO:

(I) ABROGATE OR AFFECT THE DOCTRINE OF RESPONDEAT SUPERIOR, VICARIOUS LIABILITY, OR OTHER NONDELEGABLE DUTIES AT COMMON LAW;

(II) AFFECT THE LIABILITY FOR THE NEGLIGENCE OF AN AT-FAULT PARTY; OR

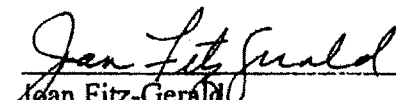
(III) ABROGATE OR AFFECT THE EXCLUSIVE REMEDY AVAILABLE UNDER THE WORKERS' COMPENSATION LAWS OR THE IMMUNITY PROVIDED TO GENERAL CONTRACTORS AND OWNERS UNDER THE WORKERS' COMPENSATION LAWS.

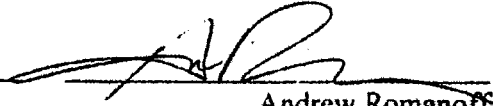
(g) **Choice of law.** NOTWITHSTANDING ANY CONTRACTUAL PROVISION TO THE CONTRARY, THE LAWS OF THE STATE OF COLORADO SHALL APPLY TO EVERY CONSTRUCTION AGREEMENT AFFECTING IMPROVEMENTS TO REAL PROPERTY WITHIN THE STATE OF COLORADO.

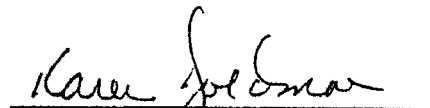
SECTION 2. Effective date - applicability. This act shall take effect July 1, 2007, and shall apply to construction agreements entered into on or after said date.

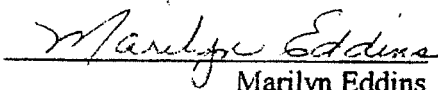
SECTION 3. Safety clause. The general assembly hereby finds,

determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.



Joan Fitz-Gerald
PRESIDENT OF
THE SENATE


Andrew Romanoff
SPEAKER OF THE HOUSE
OF REPRESENTATIVES


Karen Goldman
SECRETARY OF
THE SENATE


Marilyn Eddins
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

APPROVED 12:10 p.m. April 11, 2007


Bill Ritter, Jr.
GOVERNOR OF THE STATE OF COLORADO

8/28

2009 - 2010 LEGISLATURE

33 33/1
LRB-~~1201~~14

RPN:kjf:md



Keep

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

x
Regen

- 1 AN ACT *to repeal* 895.447 (3); and *to create* 895.447 (1m) of the statutes;
2 **relating to:** indemnity clauses in construction contracts.

Analysis by the Legislative Reference Bureau

Under current law, any provision in an agreement, other than an insurance contract or worker's compensation plan, relating to the construction, alteration, repair, or maintenance of a building that limits or eliminates tort liability is against public policy and void. The Wisconsin Court of Appeals, in *Gerdman v. U.S. Fire Insurance Co.*, 119 Wis. 2d 367 (Ct. App. 1984), held that this law does not apply to an indemnity clause in a contract in which a subcontractor agreed to hold the contractor harmless from any liability for damages resulting from the work of the contractor or subcontractor under the contract.

This bill overturns that decision, providing that such indemnity contracts are against public policy and void.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

- 3 SECTION 1. 895.447 (1m) of the statutes is created to read:
4 895.447 (1m) Any indemnity provision that is a part of or in connection with
5 any contract, covenant, or agreement relating to the construction, alteration, repair,

1 or maintenance of a building, structure, or other work related to construction,
2 including any moving, demolition, or excavation and that does either of the following,
3 is against public policy and void:

4 (a) Requires a subcontractor to limit the contractor's tort liability for damages
5 resulting from the acts or omissions of the contractor or any subcontractor.

6 (b) Requires a subcontractor to hold the contractor harmless from any tort
7 liability for damages resulting from the acts or omissions of the contractor or any
8 subcontractor.

9 **SECTION 2.** 895.447 (3) [✓] of the statutes is repealed.

10 **SECTION 3. Initial applicability.**

11 (1) This act first applies to contracts entered into on the effective date of this
12 subsection.

13 (END)

Basford, Sarah

From: Peterson, Eric
Sent: Tuesday, September 15, 2009 8:31 AM
To: LRB.Legal
Subject: Draft Review: LRB 09-3333/1 Topic: Indemnity in construction contracts

Please Jacket LRB 09-3333/1 for the SENATE.

Nelson, Robert P.

From: Peterson, Eric
Sent: Tuesday, September 29, 2009 4:57 PM
To: Nelson, Robert P.
Cc: 'Annie Early'
Subject: LRB 09-3333/1

Robert,

Can you please allow access to this LRB to Annie Early who is copied on this email. I am sending the jacket back over to you.

Eric

↑

look at 2001 AB 606

Eric M. Peterson

Chief of Staff, Senator Lena C. Taylor
Wisconsin State Senator - 4th Senate District
t - 608-266-5810 f - 608-267-2353

ASSEMBLY BILL 606

1 death, or to injury to or destruction of property other than the property improvement
2 that is the subject of the construction contract.

3 (2) Any indemnification or hold harmless clause in or collateral to a
4 construction contract is against public policy and void to the extent that the clause
5 requires the indemnitor to indemnify or hold harmless an indemnitee from, or insure
6 or defend an indemnitee against, any claim, damage, loss, or expense attributable
7 to bodily injury, sickness, disease, or death, or to injury to or destruction of property
8 other than the property improvement that is the subject of the construction contract,
9 caused by or arising out of the acts or omissions of the indemnitee or any other
10 person, except the indemnitor or the indemnitor's agents or employees.

11 (3) Notwithstanding sub. (2), an indemnification and hold harmless clause and
12 an additional insured endorsement may provide that the indemnitor indemnify an
13 indemnitee for losses that the indemnitee incurs because of the indemnitee's
14 negligent failure to discover or remedy a dangerous condition created by the
15 indemnitor.

16 (4) This section does not apply to an indemnity agreement executed by an
17 indemnitor in favor of a surety company, or to a surety bond or an insurance contract,
18 including owners and contractors protective insurance, project management
19 protective liability insurance, builder's risk insurance, or worker's compensation
20 plan. However, any additional insured endorsement furnished in accordance with
21 an agreement in or collateral to a construction contract may not extend coverage to
22 the person covered by that additional insurance if that would result in a violation of
23 sub. (2).

24 **SECTION 2. Initial applicability.**



2009 BILL

LRB-3333/2dn
RPN:kjf
new 895.447

D-N
This draft adds par. (c) to new 895.447 based on discussions with Annie Early. Please review the draft and share it with her to make sure I fulfilled the intent.
RPN

- 1 AN ACT to Reyen ~~repeal~~ 895.447 (3); and to create 895.447 (1m) of the statutes;
- 2 relating to: indemnity clauses in construction contracts.

Analysis by the Legislative Reference Bureau

Under current law, any provision in an agreement, other than an insurance contract or worker's compensation plan, relating to the construction, alteration, repair, or maintenance of a building that limits or eliminates tort liability is against public policy and void. The Wisconsin Court of Appeals, in *Gerdman v. U.S. Fire Insurance Co.*, 119 Wis. 2d 367 (Ct. App. 1984), held that this law does not apply to an indemnity clause in a contract in which a subcontractor agreed to hold the contractor harmless from any liability for damages resulting from the work of the contractor or subcontractor under the contract.

This bill overturns that decision, providing that such indemnity contracts are against public policy and void.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

- 3 SECTION 1. 895.447 (1m) of the statutes is created to read:
- 4 895.447 (1m) Any indemnity provision that is a part of or in connection with
- 5 any contract, covenant, or agreement relating to the construction, alteration, repair,

BILL

1 or maintenance of a building, structure, or other work related to construction,
(2) including any moving, demolition, or excavation and that does ~~either~~^{of any} of the following,
3 is against public policy and void:

4 (a) Requires a subcontractor to limit the contractor's tort liability for damages
(5) resulting from the acts or omissions of the contractor or ~~any~~^a subcontractor.

6 (b) Requires a subcontractor to hold the contractor harmless from any tort
(7) liability for damages resulting from the acts or omissions of the contractor or ~~any~~^a
8 subcontractor.

9 **SECTION 2.** 895.447 (3) of the statutes is repealed. ✓

10 **SECTION 3. Initial applicability.**

11 (1) This act first applies to contracts entered into on the effective date of this
12 subsection.

13 (END)

(c) Requires a subcontractor to insure
a contractor against any tort liability
for damages resulting from the acts or
omissions of the contractor or a
subcontractor.

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-3333/2dn
RPN:kjf:ph

October 1, 2009

This draft adds par. (c) to new s. 895.447 (1m) based on discussions with Annie Early. Please review the draft and share it with her to make sure I fulfilled the intent.

Robert P. Nelson
Senior Legislative Attorney
Phone: (608) 267-7511
E-mail: robert.nelson@legis.wisconsin.gov

Nelson, Robert P.

From: Annie Early [annie@martinschreiber.com]
Sent: Friday, November 06, 2009 9:52 AM
To: Peterson, Eric
Cc: Nelson, Robert P.
Subject: Update on Risk-transfer

Eric;

As I mentioned to you, I have had a few discussions with Bob Nelson on our risk-transfer bill draft. Most recently, we had a phone discussion this morning and he is going to clarify a few things in the bill draft. Both Bob and I wanted to be sure you were aware of our discussions. I appreciate your willingness to let us work these details out.

If you have any questions let me know.

Thanks,
Annie

Annie M. Early
Partner
Martin Schreiber & Associates, Inc.
608.259.1212 ext. 3
www.martinschreiber.com

11/06/2009

Nelson, Robert P.

From: Annie Early [annie@martinschreiber.com]

Sent: Friday, November 06, 2009 9:47 AM

To: Nelson, Robert P.

Subject: subrogation clause language

(3) Any waiver of subrogation clause in or collateral to a construction contract is against public policy and void.

Annie M. Early

Partner

Martin Schreiber & Associates, Inc.

608.259.1212 ext. 3

www.martinschreiber.com

See 09-3333 file

2001 ASSEMBLY BILL 606

October 30, 2001 – Introduced by Representative GARD. Referred to Committee on Judiciary.

- 1 AN ACT *to create* 895.491 of the statutes; **relating to:** indemnification and hold
2 harmless provisions and additional endorsements in construction contracts.

Analysis by the Legislative Reference Bureau

Under current law, any provision in an agreement relating to the construction maintenance or alteration of a structure that limits or eliminates tort liability is void. In *Gerdman v. United States Fire Ins. Co.*, 119 Wis. 2d 367 (Ct. App. 1984), the court held that an indemnity clause in a construction contract was not affected by this law. The current law does not apply to an insurance contract or to a worker's compensation plan.

Under this bill, any provision in or collateral to a construction contract that requires one person (the indemnitor) to indemnify (secure against loss or damage) or hold harmless another person (the indemnitee) for damages, injury, or death is void to the extent that the provision applies to acts or omissions of the indemnitee or a person other than the indemnitor's agents or employees. For example, under the bill, if, as part of a construction agreement, the contractor agreed to pay any amount that the owner was required to pay to an injured party as the result of the owner's negligence that occurred during the construction of the building, that part of the agreement would be void. The bill also provides that any additional insured endorsement furnished as part of a construction agreement cannot extend coverage



11/6
State of Wisconsin
2009 - 2010 LEGISLATURE

other

LRB-3333/2 3

RPN:kjf:ph

RMNR

2009 BILL

legen

- 1 AN ACT *to repeal* 895.447 (3); and *to create* 895.447 (1m) of the statutes;
2 **relating to:** indemnity clauses in construction contracts.

Analysis by the Legislative Reference Bureau

Under current law, any provision in an agreement, other than an insurance contract or worker's compensation plan, relating to the construction, alteration, repair, or maintenance of a building that limits or eliminates tort liability is against public policy and void. The Wisconsin Court of Appeals, in *Gerdman v. U.S. Fire Insurance Co.*, 119 Wis. 2d 367 (Ct. App. 1984), held that this law does not apply to an indemnity clause in a contract in which a subcontractor agreed to hold the contractor harmless from any liability for damages resulting from the work of the contractor or subcontractor under the contract.

This bill overturns that decision, providing that such indemnity contracts are against public policy and void. *Ins. and B.*

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

- 145 1-3
3 SECTION 895.447 (1m) of the statutes is created to read:
4 *stays* 895.447 (1m) Any indemnity provision that is a part of or in connection with
5 any contract, covenant, or agreement relating to the construction, alteration, repair,

Construction

BILL

1 or maintenance of a building, structure, or other work related to construction,
2 including any moving, demolition, or excavation and that does any of the following,
3 is against public policy and void: ^{USE 3} ~~PERSON~~ ^{times} *another person's*

4 (a) Requires a ~~subcontractor~~ ^{person} to limit ~~the contractor's~~ ^{another person's} tort liability for damages
5 resulting from the acts or omissions of the ~~contractor or a subcontractor~~ ^{other person}

6 (b) Requires a ~~subcontractor~~ ^{another person} to hold ~~the contractor~~ ^{another person} harmless from any tort
7 liability for damages resulting from the acts or omissions of the ~~contractor or a~~
8 ~~subcontractor~~ ^{other person}

9 (c) Requires a ~~subcontractor~~ ^{another person} to insure a ~~contractor~~ ^{another person} against any tort liability for
10 damages resulting from the acts or omissions of the ~~contractor or a subcontractor~~ ^{other person}

11 **SECTION 2.** 895.447 (3) of the statutes is repealed.

12 **SECTION 3. Initial applicability.**

13 (1) This act first applies to ^{construction} ~~contracts~~ entered into on the effective date of this
14 subsection.

15 (END)

Ins. 2-10

**2009-2010 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-3333/2ins
RPN:kjf:ph

1 ins. anl A:

not construction contracts that requires a person to indemnify or hold harmless another person from, or insure or defend another person against, any claim or damage resulting from the acts or omission of the other person are

not ins. anl B:

The bill also provides that any clause that is a part of a construction contract and that waives a person's right of subrogation is against public policy and void.

2

3 ins. 1-3 :

4 **SECTION 1.** 895.447 (1) of the statutes is repealed.

5 **SECTION 2.** ^{895.447} ~~805.447~~ (1g) of the statutes is created to read:

6 ^{895.447} ~~805.447~~ (1g) In this section:

7 (a) "Construction contract" means an agreement for architectural services,
8 alterations, construction, demolition, design services, development, engineering
9 services, excavation, maintenance, moving, repair, or other improvement to real
10 property, including any agreement to supply labor, materials, or equipment for an
11 improvement to real property.

12 (b) "Indemnity provision" means any provision in a construction contract that
13 requires a person to indemnify or hold harmless another person from, or insure or
14 defend another person against, any claim, damage, loss, or expense attributable to
15 bodily injury, sickness, disease, or death, or to injury to or destruction of property
16 other than the property improvement that is the subject of the construction contract.

17

18 ins. 2-10:

1 (d) Requires a person to defend another person against any tort liability for
2 damages resulting from the acts or omissions of the other person.

3 **SECTION 3.** 895.447 (1r) of the statutes[✓] is created to read:

4 895.447 (1r) Any waiver of subrogation clause that is a part of or in connection
5 with a construction contract[✓] is against public policy and void.